IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 704 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ARIFBHAI ABBASBHAI

Versus

STATE OF GUJARAT

Appearance:
MR S.A. SHAH for MR BK PARIKH for appellants
MR BD DESAI APP for Respondent

CORAM : MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.M.KAPADIA

Date of decision: 15/02/99

ORAL JUDGEMENT (Per A.M. Kapadia, J.):

1. In this Criminal Appeal under the provisions of Section 374 of the Criminal Procedure Code ('the Code' for short), the appellants/ who are original accused Nos.1 and 3, have brought in challenge the judgment and order dated 31.5.1993 recorded in Sessions Case No. 163 of 1992 by the learned Sessions Judge, Bhavnagar, whereby

both the appellants/ original accused Nos.1 and 3 were convicted for offence punishable under section 302 of the Indian Penal Code ('IPC' for short) and were sentenced to suffer imprisonment for life. However, they have been acquitted of the offence under Section 135 of the Bombay Police Act. Alongwith both the appellants/original accused Nos.1 and 3, accused No.2, Jahed Ibrahim was also tried for the commission of the said offence with the aids of Section 114 of the IPC but the learned trial Judge acquitted him of the offence with which he was charged.

2. Brief facts giving rise to this appeal are as under:

2.1. On 11.5.1992, at about 2 P.M. deceased Mustufa, in company of his wife, Farida, had gone to the house of in-laws of her sister Vahida. The complainant Faridaben, her husband Mustufa, Alibhai and his son Farukbhai and Hasina, a daughter of Alibhai were sitting in the house. At about 2.30 P.M. Mustufa went out of the house to spit pan. At that time, all of a sudden, both the appellants/accused Nos.1 and 3 and accused No.2 came there and on hearing shouts, the complainant Faridaben and other inmates of the house, who were sitting in the house came, out and saw accused assaulting Mustufa. Accused No.1 inflicted knife blow on the stomach, accused No.3 gave knife blow on the backside of abdomen and accused No.2 gave fist and kick blows to Mustufa. According to the prosecution, the complainant, including the inmates of the house, as they came out of the house prior to the incidence on hearing shouts, witnessed the commission of the crime. It was further alleged that, Faruk, on seeing the incident, tried to intervene and separate Mustufa from the accused. Therefore, there was scuffle between accused No.3 and Faruk and in that Faruk also received injuries on his leg and thereafter as people assembled there, the accused fled from there. The sum and substance of the prosecution case is that all the accused came there with the intention to kill Mustufa and they all abetted each other for the commission of the said offence as there was previous enmity between the deceased and the accused in connection with properties of in-laws and civil suits were also pending in the Court. Therefore, according to the prosecution case, there was a motive for the accused to kill the deceased.

2.2. It was further alleged by the prosecution that the injured Mustufa was removed to hospital where his dying declaration was recorded by Executive Magistrate and complaint for the commission of the alleged offence

was lodged by Faridaben, wife of injured Mustufa. As she witnessed the incident, the complaint was recorded as per her say and the offence was registered.

2.3. During the course of treatment, Mustufa succumbed to the injuries. Thereafter inquest report was prepared and dead body was sent for autopsy.

2.4. During the course of investigation, statements of witnesses were recorded, panchnama of scene of offence was prepared and as accused No.1 showed his willingness to show the muddamal weapon which he used for the assault, panchnama under section 27 of the Indian Evidence Act was prepared and muddamal article, i.e., knife was recovered.

2.5. At the conclusion of the investigation, as it was divulged that all the accused have committed the offence and also abetted in commission of the offence, the appellants alongwith the acquitted accused No.2 were charge-sheeted for the said offence in the Court of learned Judicial Magistrate, First Class. On committal, all the accused were tried by the learned Sessions Judge, Bhavnagar in Sessions Case No. 163 of 1992.

2.6. Charge was framed against all the accused which was read over and explained to them to which they pleaded not guilty and they claimed to be tried and, therefore, all of them were put on trial.

2.7. In order to bring home the charge levelled against the accused, the prosecution has examined in all 14 witnesses and also placed reliance on documentary evidence such as, complaint, inquest panchnama, autopsy report, discovery panchnama, panchnama of the scene of offence, report from Forensic Science Laboratory and the dying declaration of the deceased which was recorded by the Executive Magistrate.

2.8. On appreciation and evaluation of the evidence on record, the learned trial Judge came to the conclusion that homicidal death of Mustufa is proved. He also came to the conclusion that there was a motive on the part of the accused Nos.1 and 3 to kill Mustufa as there was enmity between both the groups in respect of ancestral properties for which suits were also filed and pending in the Court of law. The learned trial Judge held that there was intention on the part of accused Nos.1 and 3 to commit murder and in furtherance thereof on the fateful day both of them came at the scene of offence with knife and assaulted the deceased on his vital parts and

committed his murder. The said incident was witnessed by his widow, P.W.1, Faridaben, Ex.11, P.W.2, Faruk Alibhai, Ex.14, P.W.3, Hamidaben, Ex.15, P.W.4, Alibhai Karimbhai, Ex.16 and P.W.5, Jivuben, Ex.17. Presence of all the witnesses near the scene of offence is also very natural as the incident has taken place just outside their house and all of them were sitting in the house at the relevant time and on hearing the shouts, as per prosecution case, they came out and witnessed the incident. Assailants are relatives of the deceased and, therefore, there was no question of wrong identification. The learned trial Judge, therefore, held that the prosecution has proved beyond doubt that both the appellants/accused Nos.1 and 3 have committed murder of Mustufa while no role was attributed to accused No.2. He, therefore, recorded culpability of both the appellants/ accused Nos.1 and 3 and accordingly arrived at the conclusion of culpability against both of them while recorded finding of acquittal in favour of accused No.2 and resultantly both accused Nos.1 and 3 were convicted for the offence under Section 302 of IPC and sentenced them to suffer imprisonment for life. It is this order of recording conviction and sentence which is now challenged before us in this appeal by the original accused Nos.1 and 3.

2.9. It may be appreciated that the State has not preferred appeal against the order of acquittal passed in favour of accused No.2.

3. Mr. S.A. Shah, learned advocate for the appellants, while taking us through the entire testimonial collections, submitted that grave error is committed by learned trial Judge in accepting the evidence of the eye witnesses who are close relatives of the deceased and when the incident has taken place, all of them were sitting inside the house, and as it was over within a couple of minutes, it was impossible for them to see the incident. He, therefore, submitted that their evidence is neither untainted nor unimpeachable. He further submitted that the learned trial Judge has not considered the fact that accused No.1 has also received injuries during the scuffle. Therefore, according to him, if we accept the evidence of prosecution in that case also there was a scuffle between two groups preceded by hot exchange of words. He further submitted that accused No.1 has also filed a complaint in respect of the injuries received by him but the learned trial Judge has not considered this and thereby has committed error on facts and in law both. So far as the recovery of the knife is concerned, he submitted that there was no blood stain on it as per the panchnama and, therefore, the said

piece of evidence cannot connect the accused with the aforesaid crime. He further submitted that there is evidence to the effect that there was previous enmity between the parties with regard to ancestral properties and suits were also pending. Therefore, according to him, there was reason for the deceased to pick up quarrel and in fact the deceased picked up quarrel and in self-defence if the accused has committed any act then they are entitled to get benefit by way of self-defence. Lastly and alternatively he submitted that the said incident has taken place in a spur of moment on account of hot exchange of words with respect to the ancestral properties and the deceased provoked the accused and as a result of the same if accused have caused injury to the deceased the said act falls within the exception IV to Section 300 which is not murder but culpable homicide not amounting to murder and, therefore, according to him, accused may be acquitted or in the alternative they may be held guilty and convicted for the offence of culpable homicide not amounting to murder punishable under Section 304 of IPC.

4. Mr. B.D. Desai, learned A.P.P., has supported the judgment and order passed by the learned trial Judge and stated that the learned trial Judge has not committed any error either in law or on facts. On the basis of the evidence adduced by the prosecution, there are five eye witnesses who saw the incident and they have narrated the incident as per the statement recorded in the complaint and police statement so also in dying declaration of the deceased recorded by the Executive Magistrate, which is produced on record. From the totality of the evidence, culpability of the appellants is proved and there is no iota of evidence to doubt about their culpability. There was a motive and the said motive is also proved by the prosecution as the accused have not denied about the dispute with respect to ancestral properties. On the contrary, they have stated in their complaint also that the accused are related to the deceased and, therefore, there was no question of wrong identification. He submitted that though it is proved that there is no blood stains on the knife but that fact alone is not decisive point with respect to the culpability of the accused as there are ample evidence of eye witnesses on record connecting the accused with the commission of the crime. Lastly he submitted that the learned trial Judge has very rightly, after appreciating the evidence on record, convicted the appellants and sentenced them, which does not warrant any interference of this Court, but requires confirmation and, therefore, he prayed that the appeal may be dismissed.

5. So far as the homicidal death of Mustufa is concerned, it would not detain us much as even defence has also not raised any dispute with regard to homicidal death of the deceased. However, the learned trial Judge has recorded the evidence of P.W.6, Dr. Bharatkumar Hariram, whose oral testimony was recorded at Ex.28, who performed autopsy on the dead body of Mustufa. He has prepared the post mortem note which is on record at Ex.29 wherein he has noted internal and external injuries and he has testified that the deceased died because or shock due to septicemia due to injuries in the intraabdominal organs and, therefore, the learned trial Judge has very rightly recorded the finding that the deceased died homicidal death.

6. The next question is as to whether both the appellants were the authors of the injuries sustained by the deceased,. In this regard, we may firstly advert to the evidence of P.W.1, complainant- Faridaben, widow of Mustufa, whose oral testimony was recorded at Ex.11. She has inter-alia testified that on 11.5.1992 at 2 P.M. she in company of her husband went the house of in-laws of Vahida. At the relevant time, her husband, Alibhai, Alibhai's son Faruk, Alibhai's daughter Hasina and she herself were present in the house. Hamida was also present there. They were sitting and talking inside the house. At that time her deceased husband went out of the house to spit pan. All of a sudden they heard a shout and on hearing it all of them went out of the house and saw accused No.1 inflicting knife injury on the abdomen of Mustufa and accused No.3 was also inflicting knife blow on the back portion of the abdomen of Mustufa. Accused No.2 was also found giving fist and kick blows to the deceased and they tried to separate all of them. When Faruk came all the accused ran away. Faruk chased them. There was a scuffle and in that Faruk also received injuries. It may be appreciated that this witness was also cross-examined at length but we have noticed that this witness withstood the test of cross-examination and nothing substantial has been brought out which can doubt her oral testimony given in the examination-in-chief. It may be appreciated that she is the widow of the deceased and the accused are the nephews of the deceased and, therefore, there was no question of wrong identification by her. She has given complaint in this regard and the said complaint is produced at Ex.12. We could notice that her evidence is in consonance with the complaint which she has lodged.

7. To further corroborate P.W.1, prosecution has

examined P.W.2, Faruk Alibhai, whose evidence was recorded at Ex.14, who, according to the prosecution, while trying to separate both the parties, also received injuries and, therefore, he was an eye witness to the incident. In his oral testimony he, inter alia, stated that on the day of the incident all of them were sitting in the house talking inter-se. On that day the deceased Mustufa and his wife had been to his house. He was going out of his house. at that time three brothers came there and they caught hold of the deceased. Accused No.1 -Arifbhai inflicted knife injury on the abdomen of the deceased while accused No.3 Naushad inflicted injury on the back portion of abdomen of the deceased. He further testified that he ran to the place where the assault was going on and the inmates of the house also came out. He intervened to separate them but in that course he also received injuries on his leg. Thereafter all the three accused fled away and he took the injured Mustufa to Government Hospital on his scooter. It may also be noted that this witness also withstood the test of cross-examination and nothing substantial was brought out worth the name to help the defence.

8. The prosecution has also examined P.W.3, Hamidaben, whose testimony was recorded at Ex.15, P.W.4, Alibhai Karimbhai, whose oral testimony was recorded at Ex.16 and P.W.5, Jivuben Kasambhai, whose evidence was recorded at Ex.17. The prosecution has examined them as eye witnesses and their evidence was recorded and they have remained consistent with the evidence and also withstood the test of cross-examination. Therefore, we need not to discuss their evidence in details. However, we may say that their evidence is also so consistent which can corroborate the evidence of the complainant Faridaben and injured Faruk.

9. From the totality of the aforesaid oral testimonial collections of the witnesses coupled with the complaint at Ex.12, it cannot be gainsaid that both the appellants/accused Nos.1 and 3 gave knife blows to the deceased and there was motive behind it which according to the prosecution is in respect of ancestral property for which civil suits were also pending. Therefore, there is no escape from the conclusion that both the appellants had inflicted injuries which are proved fatal and ultimately the deceased succumbed to the same during the course of treatment.

10. To further fortify the case, prosecution has also placed reliance on the oral evidence of P.W. 7, Ghanshyamsinh Jadeja, Executive Magistrate, who recorded

the dying declaration of the deceased and who was examined at Ex.30. He has, inter alia, testified that on 11.5.1992 at about 3 P.M. he received a yadi for recording dying declaration. The said yadi was produced at Ex.31. He, therefore, went to the dispensary and contacted the doctor concerned and obtained certificate from him that the injured was in conscious state of affairs and thereafter he started interrogating the injured. During his interrogation he recorded his name, address and residential address and further on being asked the injured stated before him that in the afternoon in Amipura, accused No.1 inflicted knife blow on his abdomen and accused No.3 inflicted knife blow on the back portion of his abdomen. He has further stated that accused No.2 was also there and he inflicted fist blow on his abdomen. He has further stated that there was a family dispute with respect to ancestral properties and all of them asked him to withdraw the civil suits and to vacate the house situated at Ghogha Circle. The said dying declaration which was recorded by the Executive Magistrate Ghanshyamsinh is produced on record at Ex.32.

11. On having look at the dying declaration Ex.32, coupled with the evidence of Executive Magistrate Ghanshyamsinh, there is no iota of doubt in coming to the conclusion that both the accused Nos.1 and 3 have inflicted knife blow to the deceased. Therefore, this piece of evidence also corroborates the evidence of eye witnesses which we have discussed hereinabove.

12. From the totality of the evidence discussed above, we are of the opinion that there is no doubt about the authorship of the injuries. It is clear that both appellants i.e., original accused Nos.1 and 3 were the authors of the injuries which were found on the deceased and as a result of the said injuries, injured Mustufa ultimately died. Therefore, we are of the opinion that the learned trial Judge has very rightly held both the appellants guilty for causing such injuries to the deceased which ultimately resulted into his death.

13. Now, this takes us to the next question as to what is the offence that the appellants have committed? The learned trial Judge has recorded that the accused Nos.1 and 3 have committed offence of murder of deceased Mustufa which is punishable under Section 302 of IPC.

14. Mr.S.A. Shah, learned advocate for the appellants, while taking us through the further statement of the accused recorded under Section 313 of the Code and the complaint which is on record at Ex.21 lodged by

accused No.1 for causing injuries to him by Faruk coupled with the injury certificate, tried to persuade us that the prosecution has rightly ascribed the motive and there was a family dispute and, therefore, on the fateful day both the appellants and deceased started quarrelling and there was a scuffle and in that quarrel deceased provoked the accused and as a result of the same, accused inflicted injuries to the deceased and hence, according to him, the crime committed by the accused comes within the ambit of provisions of culpable homicide not amounting to murder which is punishable under Section 304 of the IPC.

15. On seeing the further statement of the accused recorded under Section 313 of the Code, they have stated therein that all the three original accused persons were returning from the dispensary and on the way deceased Mustufa and Faruk met them and they abused them. Accused No.1 asked them not to abuse. Thereafter the deceased took out a knife and Faruk who was having a pipe with him gave a pipe blow on the leg of accused No.1 and the deceased tried to inflict knife blow but he warded off. Therefore, the knife fell down which was taken by accused No.1 and thereafter what happened they do not remember.

16. From the complaint at Ex.21, it is noticed that accused No.1 lodged it against deceased Mustufa and Faruk for commission of offence punishable under Section 323 of the IPC, etc., wherein, inter alia, he has alleged that they all the three were returning from the house of their elder uncle who stays at Amipura. At that time his uncle Mustufa obstructed them and Faruk was also with him. Mustufa was having a knife and Faruk was having an iron pipe. Both of them abused them as a result of which accused No.2 and accused No.3 ran away. Both the deceased Mustufa and Faruk started beating him. Faruk has given pipe blow on his left leg and right hand and his uncle Mustufa though he was having a knife, he has not given knife blow but gave fist blows. Meanwhile, people assembled there and both of them fled away and thereafter he was brought to the hospital.

17. So far as the injuries received by accused No.1 is concerned, P.W.8, Dr.Dhirajlal Girddharlal, Ex.33, who examined him, has, inter alia, testified the said injuries.

18. On conjoined reading and on overall examination of aforesaid three pieces of evidence it could be gathered that accused No.1 received injuries on leg as well as on hand with the pipe. Therefore, possibility

cannot be ruled out that there was some scuffle between the assailant group, that is the appellant and Faruk who has also admitted in his evidence that there was enmity between them with regard to ancestral properties for which suits were also pending in the court of law. Therefore, there must have been some hot exchange of words between two parties and there must have been some provocation by the victim party. Though there appears to be some exaggeration in the further statement as well as in the complaint filed by accused No.1 the fact remains that there was a scuffle between two groups and in that scuffle and in hot exchange of words, on the spur of a moment, this incident must have taken place.

19. Now, coming to the injuries which were received by the deceased on his abdominal part and as a result of the which he succumbed to the same, can they be called sufficient in ordinary course of nature to cause death is the next question to be determined. In this regard, we may again advert to the evidence of P.W.8, Dr. Dhirajlal Girdharlal, Ex.33. He, inter alia, testified that on 11.5.1992 at 2.05 P.M. injured Mustufa was brought to him without police yadi and he examined him and found three injuries which were stab wound and incised wounds.

20. It may be noted that he received this injury on 11.5.1992 and died on 15.5.1992 at about 4.30 P.M. Therefore, it is clear that he died four days after receipt of the aforesaid injuries. In this connection, let us examine what is the say of Dr. Bharktkumar, who performed autopsy. Again adverting to the evidence of P.W.6, Dr. Bharatkumar, it is clear that he has admitted that reasons for septicima can be other than the injuries also. He opined that the injured died because of shock due to septicemia.

21. We have seen the nature of injuries received by deceased Mustufa, the time of infliction of the injuries and also noticed the fact that the injured died four days after the receipt of injuries. Unfortunately, we have no sufficient material on record as to the nature of treatment given to the deceased during those four days as Dr. Dhirajlal Girharlal has not highlighted what type of treatment was given to deceased.

22. At this stage, Mr. Desai, learned A.P.P., has stated that both the appellants came with knife and without any provocation, inflicted injuries on the deceased. Therefore, intention to kill him is proved and as per evidence of the doctor, injuries suffered by deceased Mustufa were sufficient to cause death in

ordinary course of nature and thus the offence committed by the accused would come under clause 3rd of section 300 of IPC and, according to him, the offence committed by the appellants is murder punishable under section 302 of IPC.

23. In order to establish charge of 300, prosecution must establish that a bodily injury is present. Secondly, it must prove nature of the injury. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, fourthly, the prosecution must prove that the injury of that type is sufficient to cause death in the ordinary course of nature. It does not matter that there was no intention to cause death. It also does not matter that there was no intention to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature. It even does not matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the next thing to be proved is whether the injury is sufficient in the ordinary course of nature to cause death.

24. Exception 4 of Section 300 of IPC prescribes that culpable homicide is not murder if it is committed without prmeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner. When two contending parties, each armed with sharp-edged weapons, clashed and in the course of a free fight some injuries were inflicted on one party or the other, it cannot be said that either of them acted in a cruel or unusual manner. In a case where there is no reliable and acceptable evidence as to how the mutual conflict developed and as to who was the agressor, the plea of private defence on either side would not be permitted. Such a case would be a case of sudden fight and would fall under SEction 300, Exception 4. In the instant case, there was hot exchange of words and there was scuffle between two groups and in that both the sides sustained injuries. Therefore, the offence committed by the appellants falls under exception 4 of Section 300 of IPC.

25. We are also fortified in our above finding in view of the decision of the Honourable Supreme Court of India in the case of Harish Kumar v. State (Delhi

administration), AIR 1993 SC 973, wherein the Honourable Supreme Court has altered conviction from under Section 302 to one under Section 304 part II of IPC as there was no sufficient evidence as to the injury which has resulted into the death of the injured.

26. In the present case, both the parties are related to each other and they had past enmity and they were having dispute with respect to some ancestral properties for which civil suits were also pending in court. On fateful day on the ota of the house where the incident took place both the groups started quarreling with each other and in that quarrel this incident has happened. Unfortunately, there is no evidence to prove as to which party was the aggressor first in point of time. All the eye witnesses who are examined by the prosecution have stated about the infliction of injuries but what had happened prior to the infliction of injury, that fact is not forthcoming from any of the witnesses and, therefore, there is no reason to disbelieve the explanation offered by the accused in further statement and complaint filed by accused No.1. Taking into consideration the aforesaid facts coupled with this the fact that deceased died four days after receipt of the injuries and also in view of the above referred decision of the Honourable Supreme Court, we are of the opinion that we cannot conclusively say that the injuries inflicted on the deceased were sufficient to cause his death in ordinary course of nature. Moreover, exception 4 of Section 300 is also attracted in view of the fact that the injuries were caused without premeditation and have been inflicted in the spur of a moment, upon sudden quarrel and the assailants had not taken any undue advantage or acted in cruel or unusual manner. Accordingly, we hold that the offence committed by both the appellants/ original accused Nos.1 and 3 is not murder punishable under section 302 of IPC but is culpable homicide not amounting to murder punishable under section 304 Part II of IPC.

27. In the result, we set aside the impugned conviction under Section 302 of IPC and sentence to suffer imprisonment for life imposed by the learned trial Judge. We, however, convict the appellants/accused Nos.1 and 3 for the offence punishable under Section 304 Part II of IPC and impose sentence of R.I. for 7 years and to pay fine of Rs.25,000/- (Rupees twenty five only) each, in default, to undergo R.I. for a further period of three years. If the amount of fine is paid by accused Nos.1 and 3/ appellants herein, the same shall be paid to P.W.1, Faridaben, widow of the victim Mustufa by way of compensation, upon due verification, by the lower Court.

28. Accordingly, the appeal is partly allowed. Order accordingly.

(karan)